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NTSB Order No. EA-3501

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 1st day of February, 1992

BARRY LAMBERT HARRIS, Acting Administrator, Federal Aviation Administration, Complainant, v. JOHN FAY AND JOHN TAKACS, Respondents.	Docket SE-9484 SE-9487

OPINION AND ORDER

Respondents have appealed from the oral initial decision issued by Administrative Law Judge Joyce Capps on August 21, 1989, at the conclusion of an evidentiary hearing.[1] By that decision, the law judge affirmed, in part, an order of the Administrator suspending for 90 days respondent Fay's airline transport pilot certificate and suspending for 60 days respondent Takacs' flight engineer certificate for their alleged violation

[1] That portion of the hearing transcript containing the initial decision and order is attached. Respondents sought to correct an error in another portion of the transcript, the Administrator concurred, and the law judge granted the motion on December 18, 1989.

of section 91.9 of the Federal Aviation Regulations ("FAR"), 14 CFR Part 91.[2] The law judge modified the Administrator's order to the extent of reducing the suspension period to 7 days.[3] We deny respondents' joint appeal and affirm the 7-day suspensions.[4]

The orders of suspension against respondents were issued in connection with a May 11, 1987 incident involving an Eastern Air Lines Boeing 727 at Long Island MacArthur Airport. Respondent Fay was the pilot-in-command ("PIC") and respondent Takacs the flight engineer. The Administrator claimed that a jet exhaust blast from the 727 caused the tipping over and damaging of a Cessna 172 parked nearby.[5] As a result, respondents were charged with violating section 91.9.

Respondents claimed that, rather than jet exhaust, a gust of wind caused the Cessna to tip and the Piper to rotate. They testified that a quartering headwind such as had occurred that

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[2] FAR section 91.9 (now 91.13(a)) prohibits a person from operating an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[3] By order of December 21, 1988, the law judge consolidated the cases (both of which stem from the same incident), and denied respondent Takacs' motion to dismiss. Neither action has been appealed to this Board.

[4] The Administrator, by petition filed December 7, 1989, seeks to withdraw his appeal, a request we grant.

[5] Respondent Takacs did not ensure, as part of his preflight inspection, that all the small aircraft were tied down. The Cessna had not been. The order of suspension also noted that another aircraft, a Piper PA-28, was blown 90 degrees off its original position. Two rows of smaller aircraft (including the Cessna and Piper) were parked 125-150 feet behind the 727. Tr. at pps. 76, 112, 179.

day could have tipped the Cessna. Respondents also suggested that the blame lay elsewhere, i.e., with whoever failed to tie down the Cessna. Respondents further argued that they properly relied on the authorization to taxi given by other airport personnel, notably the ground crew who controlled the aircraft's departure from the ramp.

The law judge rejected this theory, declining to find as respondents urged that the wind was gusting from the southeast at 22 mph at the time the Cessna tipped. She further held, in any event, that a 22 mph gust of wind from the southeast would not have turned the Cessna over. Tr. at p. 311. Applying the Lindstam doctrine, she concluded that the exhaust from the 727 caused the Piper's and Cessna's movement and that respondents were responsible, whether their actions were intentional or not.[6]

Respondents raise a number of issues on appeal. They first argue that the preponderance of the evidence does not support the

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[6] Administrator v. Lindstam, 41 C.A.B. 841 (1964). Under this doctrine, the Administrator need not allege or prove specific acts of carelessness to support a violation of section 91.9. Instead, using circumstantial evidence, he may establish a prima facie case by creating a reasonable inference that the incident would not have occurred but for carelessness on respondent's part. The burden then shifts to respondent to come forward with an alternative explanation for the event sufficient to cast reasonable doubt on (i.e., overcome the inference of) the Administrator's claim of carelessness. If respondent can show that carelessness is not the only reasonable inference, the burden of going forward shifts back to the Administrator to show that respondent's explanation is unreasonable. Administrator v. Davis and Manecke, 1 NTSB 1517, 1520-21 (1971).

law judge's finding that jet exhaust caused the Cessna and Piper movement. Next, they claim that precedent does not support a finding of carelessness by either respondent, and that neither respondent's actions were careless. Allegedly, respondent Fay also is blameless because he had a right to rely on, among others, respondent Takacs' proper performance of his responsibilities, and the charge against respondent Takacs should be dismissed because he legitimately assumed that the small aircraft behind the 727 would be tied down. Finally, they argue that, even if violations are found, precedent does not support imposition of any sanction. We address each issue below.

1. Is the law judge's decision supported by the preponderance of the evidence? The Administrator's case was premised on both direct and circumstantial evidence. As to the former, respondents make much of alleged inconsistencies in certain testimony given by the Administrator's Witness Gagliano, and challenge its reliability.[7] We need not reach this matter

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[7] I.e., Exhibit A-4 is a report he prepared at the time of the incident. This report states, in part:

> I was observing a Helicopter departure when I saw a Cessna parked on the Hudson ramp. The left wing of the Cessna was touching the ground. . . . At this time I asked Ground Control what was going on. I then noticed EA703 a B727 start taxiing on the main ramp.

At the hearing, the witness said:

> As I was watching the helicopter landing, I happened to see a Boeing 727 starting his taxi and then right behind it I saw a Cessna 172 start to tip over and I saw its right wing tip touch the ground.

(continued...)

because the law judge did not rely on this aspect of Witness Gagliano's testimony. Instead, she specifically declined to find that Mr. Gagliano saw the Cessna tip or the Piper move.[8] Accordingly, whatever inconsistencies there may have been between Witness Gagliano's testimony at the hearing and his prior statements, they offer no basis for reversal of the law judge's decision. Contrary to respondents' allegation, the law judge did not "credit Gagliano's version of the key events" (Appeal at p. 28).

Respondents also challenge the law judge's application of Lindstam, supra, and two underlying findings of fact. Respondents argue that they presented, as required, a reasonable alternative explanation for the incident and that the Administrator failed to show that alternative explanation unreasonable.

We disagree. Under Lindstam, the alternative explanation must be reasonable initially to put in question the inference of carelessness. The law judge found unreasonable the suggestion that a gust of wind caused the incident. There is ample record support for the law judge's conclusion and the two subsidiary findings.

There is inadequate basis to overturn the law judge's first

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[7](...continued)
Respondents claim that the prior statement indicates that the witness did not actually see the Cessna tipping over, but only saw it tipped over after the fact. They strongly question what appears to them to be dramatically changed testimony.

[8] Tr. at p. 310.

finding that, at the critical time, there was no 22-mile gust of wind.[9] No such gust was recorded by the National Weather Service (Exhibit R-5), or reported to the aircraft at the time of departure (see, e.g., Tr. at pps. 270-273).[10] On this record, we cannot find that the law judge's finding of fact was in error, and to the extent that issues of credibility are involved, respondents have not shown her conclusion so incredible as to warrant reversal. In sum, although respondents showed this part of their theory to be a possibility, Lindstam requires a reasonable possibility. The law judge concluded it was not, and the appeal offers insufficient basis to disturb her finding.

We reach the same conclusion with regard to her more significant conclusion that a 22-mph gust would have had to hit the Cessna squarely from the side to knock it over (in effect, finding that even if a 22-mph gust had occurred, it could not have had the result respondents claim). In contrast to respondents' testimony that such a gust could tip a Cessna, there was considerable testimony by the Administrator's disinterested

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[9] The law judge alternatively refers to knots and miles-per-hour. At the wind speeds involved in this case, the difference of 15% between knots and miles-per-hour is not material to our discussion.

[10] According to the record, for a gust to be recorded by the National Weather Service it must be sustained for at least 5 minutes. In contrast, what is reported to the aircraft by the tower is the weather at that moment. In this case, the latter report was 13 knots, and there is no allegation that a wind of that strength could have tipped the Cessna. The National Weather Service did not record the wind at the particular time involved. It did, however, report a 20-knot gust approximately 1 hour and 40 minutes earlier, and two 22-knot gusts approximately 20 minutes and 1 hour and 20 minutes later.

witnesses to the contrary, noting among other things that, with the aircraft pointed south, a 22-mph southeast wind would cause a component perpendicular to the aircraft that would have been considerably less that 22 mph.

Respondents further allege that various of the law judge's remarks indicate that she misapplied Lindstam's respective burdens of proof and of going forward. We find any misstatements on her part merely harmless error. In Administrator v. Davis and Manecke, 1 NTSB 1517, 1521 (1971), we stated:

> [T]he establishment of a prima facie case shifts to respondent the burden of going forward with the evidence, and of explaining away the case thus made.

Upon finding that the Administrator had made a prima facie case, the law judge noted that the burden of "proof" shifted to respondents to show it was not the jet blast that did the damage. Although she should have referred instead to the burden of going forward, her ultimate conclusions are not undermined or invalid. It was respondents' burden to present sufficient evidence to suggest another reasonable and possible cause for the incident, one sufficient to cast doubt on the Administrator's hypothesis. Whether framed in terms of burden of proof or burden of going forward, the fact remains that the law judge's finding that respondents did not do so is supported in the record. Overall, because we find no demonstrated error in the law judge's failure to find respondents' theory a reasonable alternative cause of the incident, respondents' challenge to her application of the Lindstam doctrine must fail.

2. Were respondents careless, in violation of section 91.9? Respondents first argue that precedent in prior jet blast cases absolves both airmen in the instant case. We disagree. Respondents' analysis of those cases misses the point. The four factors respondents cite are only illustrative of jet blast incidents; they are not criteria for a section 91.9 finding. For example, two of the factors -- negligent misconduct and excessive power -- are simply matters of pleading; the Administrator may choose to frame his complaint with those specific allegations or not. Significantly, another factor they cite -- damage -- has no bearing on whether a section 91.9 violation will be found. Potential endangerment is all the rule requires. The extent of damage is considered, if at all, in regard to the sanction imposed.

More importantly, respondents' analysis ignores a basic, underlying thread of jet blast (and other) safety cases. That is the requirement that pilots, especially PICs, be aware of conditions around the aircraft, including obstacles, and act accordingly, with utmost concern for safety.

In Administrator v. Gebhardt, 1 NTSB 1756 (1972), we held that incomplete small aircraft tie down did not excuse the consequences of jet blast when the tie down area is visible and the pilot should have been aware of the effect of engine blast. See also Administrator v. Kline, 1 NTSB 1591 (1972) and Administrator v. Gallagher, 2 NTSB 2391 (1976) (prudent pilot must consider conditions vis-a-vis potential effect of engine

thrust); and Administrator v. Neville, 3 NTSB 1478, 1480 (1978).

Respondent Fay admitted the potential hazard of jet blast to light aircraft, and stated he would not have started the 727 if he had known the true situation. Tr. at p. 251. Respondent Takacs recognized that the small aircraft needed to be tied down to protect them from damage. See also Exhibit R-8, an excerpt from Eastern's flight training manual showing that areas up to 150 feet are susceptible to jet exhaust blast, and the type of damage that can occur. A higher duty of care than that exhibited by either respondent is required.

Respondents further argue that each reasonably relied on performance by another: PIC Fay had a right to rely on the flight engineer's proper performance of his duty; flight engineer Takacs had a right to rely on the proper tie down of the smaller aircraft. Therefore, in their view, the charges against both should be dismissed. Although we have found certain circumstances warranting a "right to rely" defense, we reject its application here.

As a general rule, the pilot-in-command is responsible for the overall safe operation of the aircraft. If, however, a particular task is the responsibility of another, if the PIC has no independent obligation (e.g., based on operating procedures or manuals) or ability to ascertain the information, and if the captain has no reason to question the other's performance, then and only then will no violation be found. See, e.g., Administrator v. Dickman and Corrons, 3 NTSB 2252, 2257-2260

(1980) and cases cited there.[11]

There are critical differences between those cases where we have excused the PIC and the instant case. Here, respondent Fay unquestionably was competent and able to recognize a potential hazard. This is not a case involving specialized, technical expertise where a flight crew member could not be expected to have the necessary knowledge. Cf. Dickman and Corrons, supra (number and layout of cattle holding pens affecting the aircraft's center of gravity not easily discernible).[12]

Furthermore, Neville, supra, addresses the reliance issue in the context of jet blast cases. We found a violation of section 91.9 there despite a finding that a ramp agent should have advised the pilot of a vehicle behind the aircraft. For the basic safety reasons discussed in that case, neither respondent here was absolved although they followed ramp worker directions to proceed off the ramp. They are held to a higher degree of care, and as noted in Neville, the ground personnel will not have all the pertinent information that allows a pilot to determine whether an operation will be safe or not.

As to respondent Takacs, we further note that his preflight

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[11] Two cases cited by respondents (Administrator v. Thomas, 3 NTSB 349 (1977) and Administrator v. Coleman, 1 NTSB 229 (1968)) do not appear to us to be especially relevant. They involved reliance on radio instructions the pilot-in-command had not heard, and confirmation of the pilot-in-command's understanding of instructions, respectively.

[12] We also reject the notion that the flight engineer's duty to check the area around the aircraft (see Exhibit A-13) was so specific as to remove from the PIC any obligation adequately to apprise himself.

obligations specifically included the duty to "check the general area around the aircraft for hazards to safety of aircraft and personnel," and there is no basis in the record to conclude that this somehow did not encompass the situation here. Just as with respondent Fay, it was not prudent or reasonable for the flight engineer to assume that all the small aircraft were tied down because they should be tied down and he saw some that were.[13] He, as well, should have been aware of the danger of jet blast and should have ensured safe taxiing from the parking area through, for example, a close inspection of the small aircraft nearby.[14]

3. Was the 7-day suspension imposed by the law judge excessive? We have reviewed respondents' arguments and the cited cases, and find no basis to overturn the 7-day suspension ordered by the law judge. The sanction for a jet blast violation has typically been 15 days. See discussion in Administrator v. Taylor, 3 NTSB 2583, 2587 (1980). Only if mitigating circumstances are found, are suspensions of lesser duration. Respondents do not offer good reasons to reduce the suspension below 7 days. The two cases respondents cite in which no sanction was imposed, Administrator v. Logan, 1 NTSB 777 (1970)

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[13] In fact, and despite respondents' claim (Appeal at p. 42) that the FAA's Flight Training Manual so requires, there is no indication in the record that tying down the small aircraft was required by regulation. Even if it were, respondents' behavior would not be excusable.

[14] As we have said on numerous occasions, the aircraft can also be towed from the gate if there is any potential jet blast concern.

and Administrator v. Hartnagel, 2 NTSB 569 (1973), are not on point. In Logan, there was no sanction because there was no violation found. The facts in Hartnagel are considerably different from those here.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's request to withdraw his appeal is granted;

2. Respondents' appeal is denied; and

3. The 7-day suspension of respondent Fay's airline transport pilot certificate and respondent Takacs' flight engineer certificate shall begin 30 days from the date of service of this order.[15]

KOLSTAD, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[15] For the purposes of this opinion and order, respondents must physically surrender their certificates to an appropriate representative of the FAA pursuant to FAR section 61.19(f).